No. 11952

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPORATION,
Appellant,

v.

CIRACO MANEJA, ET AL., *Appellees.*

and

CIRACO MANEJA, ET AL., *Appellants,*

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPORATION,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

REPLY BRIEF FOR APPELLANT.

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I.

ALL OF THE EMPLOYEE APPELLEES ARE "EMPLOYED IN AGRICULTURE" WITHIN THE MEANING OF SECTION 3(f) AND THEREFORE ARE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT AS PROVIDED BY SECTION 13(a)(6).

The first issue before this court is whether the employees of this appellant are employed in "agriculture" as that term is defined in Sec. 3(f) of the Act. To be exempt an employee must simply be employed in one or another of the

activities or practices referred to in the statutory definition (Appellant's Br., pp. 15-17). By emphasizing extraneous issues,[1] appellees' brief (pp. 7-16) shows persistent unwillingness to rest the case upon facts which the statutory definition of "agriculture" makes relevant.

A. Size, mechanization and integration of appellant's operations are immaterial to the issue here.

Farms as large as appellant's are not rare in the United States, and mechanization of agriculture is commonplace (Appellant's Br., p. 17). Even appellant's plowing, weeding, irrigating and harvesting operations—all admittedly within the agricultural exemption—are mechanized. And throughout American agriculture, growing operations are commonly integrated with processing operations. See Brief for American Farm Bureau Federation, *amicus curiae* herein, pp. 2-3, 6-8. American farmers and farms commonly engage in the following activities, all of which are performed by the appellant: (1) hauling of the farm's produce to a storage place or a processing plant located either on or off the farm or to any market; (2) hauling of fertilizer, seed, other agricultural supplies and agricultural equipment from one part of the farm to another; (3) hauling of necessary farm supplies and equipment from a nearby town to the farm; (4) maintenance, repair and operation of trucks and other hauling facilities used by the farmer, including maintenance of field roads on the farm; (5) repair and overhauling of farm machinery, equipment and implements; (6) feeding and shoeing horses and mules; (7) maintenance and repair of farm buildings and grounds,

[1] Bulletin 687, Department of Labor, extensively relied upon by appellees, was issued in 1939. It is obvious however that in a declaratory judgment action like this one, where the relevant facts are those presently in existence, a bulletin issued in 1939, even if otherwise relevant, would be entitled to no weight. Bulletin 687 has been superseded by Bulletin 926, published in 1947, copies of which have been supplied this court. Nothing in either Bulletin may be relied upon to modify the stipulated facts on which this declaratory judgment action was submitted. According to the Stipulation which was filed with the court below on September 12, 1947, the facts and figures therein "represent a substantially true and accurate description of such activities and operations at the present time . . ." (R. 224).

and tools and implements used in the farm operations; and (8) processing of agricultural products grown on the farm preparatory to marketing. *Id.*, pp. 2-3, 6-8.

The processing by a farmer of the sugar cane he grows is, and has always been, a normal incident of sugar cane farming in Hawaii (R. 131, 184, 325-327).[2] In view of the highly perishable nature of sugar cane, which requires that it be processed into sugar, syrup or molasses within a few hours after being harvested and therefore within a few miles of where it is grown (R. 133), the processing, when done by the farmer who grows the cane, is nothing more than the preparation of the sugar cane for market. Sugar cane never moves into interstate commerce as such nor does it have any economic use except for processing into raw sugar (R. 133). Such processing can hardly be likened (Appellees' Br. p. 19) to the erection by the farmer of a shirt factory on his cotton farm and the claim of exemption for the shirt manufacturing. The weaving of the cotton into textiles and the manufacture of shirts from the textiles would obviously not be necessary or related to the marketing of the cotton grown on the farm.

B. Existence of the "factor" system in Hawaii, membership in Hawaiian Sugar Planters' Association, and part ownership of a sugar refinery are likewise immaterial.

Nothing in the statutory definition suggests that any consideration is to be given to the other issues sought to be injected by appellees. The existence of the "factor" system, the appellant's membership in Hawaiian Sugar Planters' Association and the appellant's alleged part ownership of a sugar refinery in California are irrelevant factors. This case in no way involves employees of any of the "factors" or of Hawaiian Sugar Planters' Association.

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[2] The size and integration of Hawaiian sugar plantation operations resulted from natural factors and economic considerations. *Bulletin 926,* Department of Labor, p. 33. Such operations have resulted in high per-worker productivity, and largely determine the standard of living in Hawaii. *Id.* Hawaiian plantation labor is probably the highest paid agricultural labor throughout the world.

C. The Appellant is a "farmer" and operates a "farm" as those words are used in the statutory definition of "agriculture".

1. Appellees' brief (pp. 10, 13, 16, 18, 21, 22) repeatedly argues that appellant is not a "farmer" and that it does not operate a "farm". But a "farmer", as that word is used in Sec. 3(f), is one who engages in the operations enumerated in that section, including the growing of agricultural commodities. In other words the grower is necessarily a farmer. And a "farm", as used in Sec. 3(f), must mean the land or other place, under the ownership or control of the grower, where the growing operation takes place. The appellant thus *is* a farmer and operates a farm, for the undisputed facts show that all the lands in the case devoted to the growing of sugar cane are managed and operated by the appellant as an integrated farming unit and single enterprise with identical cropping, cultivation and harvesting practices, and with the same labor and equipment. (R. 135-136, 413.) Moreover, the appellant's farm has been about the same size since 1910 (R. 133).

As the Second Circuit said in *Damutz* v. *Pinchbeck,* 158 F. (2d) 882, 883, the test of whether an activity is exempt as "agriculture" under the Act is whether it comes under the statutory definition of agriculture contained in Sec. 3(f), and such statutory definition embraces "much more than what might be called ordinary farming activity" (Appellant's Br., p. 16).[3] Appellant's operations, moreover, are not unusual in American agriculture. *Supra,* pp. 2-3.

2. Appellees assert (Br. p. 21) that in Interpretative Bulletin No. 14, dealing with the agricultural exemption, the Administrator was discussing "farmers" and "farms" as those terms are known in the *continental* United States; that he did not have in mind the huge, highly mechanized

[3] "Employment in agriculture is probably the most far-reaching" exemption in the Act. *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607, 612. This statement of the Supreme Court refutes appellees' contention (Br. p. 32) that the fishing industry exemption in Section 13(a)(5) is much broader than the "agriculture" exemption and therefore that the case of *McComb* v. *Consolidated Fisheries Co.,* 75 F. Supp. 798 (D. Del. 1948) discussed in appellant's main brief, p. 42, does not support appellant's claim of the agricultural exemption for all its operations.

and integrated operations in the Territory of Hawaii. There is nothing in the Bulletin to indicate that the Administrator was using the terms "farmer" and "farm" in any sense except that compelled by the statute. Nowhere does the Administrator distinguish between small farm operations and large, highly mechanized and integrated operations. The Administrator did not exclude the Territories from the operation of Bulletin No. 14. Section 3(c) of the Act defines the term "State" to include "any Territory," and there is nothing in Sections 13(a)(6) and 3(f) which gives those sections different meaning as applied to Hawaii from that as applied to continental United States. Nor has the Administrator attempted to give them any different meaning. This is apparent from paragraph 2 of the Administrator's Interpretative Bulletin No. 2, issued October 17, 1938, which states:

> "Therefore, employees within the District of Columbia, and the Territories and possessions (Alaska, Hawaii, Puerto Rico, the Canal Zone, Guam, Guano Islands, Samoa, Virgin Islands), are dealt with on the same basis as employees working in any of the forty-eight states."[4]

D. The appellant's mill operations are "incident to" its field operations even though appellant's end product is raw sugar. In any event appellant's mill operations are "in conjunction with" its field operations and are for that reason alone exempt under the definition of "agriculture".

Appellees assert that the sole and only purpose of the industry is the production of raw sugar and ultimately refined sugar; that the growing of cane is subordinated to, and is synchronized with, the needs and capacities of the mill, instead of the other way around (Br., p. 10).

Where a series of operations are necessary to achieve the end result of raw sugar, the processing operation is not

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[4] The same paragraph appears without change as Section 776.1(c) of the Administrator's "General Statement on Coverage of Fair Labor Standards Act," published in the Federal Register of July 11, 1947 (12 F. R. 4583-4586). See Title 29, Code of Federal Regulations, Chapter V, Part 776; 3 C. C. H. Labor Law Reporter (4th ed.) ¶ 24,102.01.

shown to be paramount merely because it is the final step, and all the preceding operations, i.e., the hauling of supplies to the cane fields, the planting, cultivating and harvesting of sugar cane, the transportation of cane to the mill, etc., shown to be subordinate features merely because they are the prior steps. In terms of effort as represented by hours of labor and in terms of expense as represented by operating charges, appellant's mill operations are clearly subordinate to its cultivating, irrigation, harvesting, cane transportation and other general field operations. (Appellant's Br. pp. 26-28). Such mill operations thus satisfy the subordinacy tests laid down by the Administrator. *1944-45 W H Man.,* pp. 592-593.

But even assuming *arguendo* that appellant's field operations are subordinate to the mill operation, appellees' argument still proves nothing. The statutory definition not only embraces "practices . . . *incident* to . . . farming operations" but, as a separate and distinct category of exempt operations, it also embraces "practices . . . performed by a farmer or on a farm . . . *in conjunction with* . . . farming operations" [Emphasis supplied]. The phrase "in conjunction with", unlike "incident to", has no connotation of subordinacy (Appellant's Br. p. 28). The mill operation is "in conjunction with" the field operations of appellant and as such is within the statutory exemption.

E. The legislative history of Sections 13(a)(6) and 3(f) shows that all employees of appellant here involved fall within the "agriculture" exemption.

1. Nothing in the legislative debates supports appellees' contention that when the Senators spoke of sugar cane processing, they referred only to the sugar cane processing that takes place in the southern states of the United States. The debates on this matter, which are set forth extensively at pages 81-83 of appellant's brief, show clearly that the Senators were not limiting their discussions to any geographical area.

2. Appellees concede (Br. p. 18), citing Senator Black, that where a small farmer both grows and processes cane he is exempt in both his growing and processing operations.

Yet under such circumstances there would be integration of the growing and processing operations—the very situation here involved. The added fact that appellant's operations are large and mechanized is immaterial. *Supra,* pp. 2-3.

The legislative history shows that the agricultural exemption is not confined to small non-integrated and non-industrialized operations. Bottling milk, packing apples, ginning cotton and slaughtering and preparing hogs for market—all highly industrialized operations—were intended to be exempt if such operations were performed by a farmer upon his own produce (Appellant's Br. pp. 34-35). Indeed these highly industrialized operations were considered exempt under a definition of "agriculture" which was later broadened considerably by a succession of amendments to include exemption for (a) practices performed "on a farm" as an incident to farming operations; (b) preparation for market; (c) delivery to market; (d) delivery to storage; (e) delivery to carriers for transportation to market; and (f) practices performed "in conjunction with" farming operations. Since such operations were deemed exempt under a narrower definition of agriculture than now appears in the Act, *a fortiori* they are exempt under the much broader definition that was ultimately adopted.

3. Appellant's main brief (pp. 40, 93) quotes statements made by appellee union to two legislative Committees of Congress to the effect that the bulk of the 28,000 workers engaged in the production and processing of sugar cane in Hawaii are not covered by the Fair Labor Standards Act; that 18,000 of such workers are field workers "of course, not covered"; and that the remaining 10,000 work in the mills and are excluded by Section 7(c) from the overtime provisions of the Act for 10 months of the year. These are statements by the appellee union, and not, as appellees now contend (Br. p. 19), expressions of the law "as presently interpreted by the employers". These statements were made for the purpose of enlisting Congressional action on legislation substantially narrowing if not eliminating the agricultural exemption. Congress declined to pass that legislation (Appellant's Br., p. 40). Appellees

now seek to obtain from this court an interpretation contrary to that urged on Congress by appellee union itself.

F. The "agriculture" exemption in Section 13(a)(6) and the processing exemption in Section 7(c) overlap in many significant respects.

On page 20 of their brief appellees contend that "the most conclusive evidence that Congress did not intend the 'agriculture' exemption to extend to the processing of raw sugar is the fact that it expressly exempted such processing from the overtime provisions of the Act (but not the minimum wage provisions thereof) in Section 7(c)." We have already shown the important respects in which the agricultural and processing exemptions overlap (Appellant's Br. pp. 31-33). The Administrator has time and again recognized such overlapping. Compare paragraph 10(b) of his Interpretative Bulletin No. 14 with paragraphs 15-21 of that Bulletin. The Administrator's lawyers have likewise held:

> "We are definitely of the opinion that under proper circumstances the Section 13(a)(6) exemption may apply to the slaughtering, packing and shipping of pigeons. It is true that Section 7(c) provides a specific 14-workweek exemption for 'handling, slaughtering, or dressing poultry or livestock'. But Section 7(c) also provides a similar 14-workweek exemption for canning or packing perishable or seasonal fresh fruits or vegetables; and it will be noted from paragraph 10(b) of Bulletin No. 14 that canning and packing of fresh fruits and vegetables may under proper circumstances be exempt under Section 13(a)(6)". *1944-45 W H Man.*, p. 595.

G. The cases and administrative interpretations particularly sustain the "agriculture" exemption for appellant's employees engaged in hauling cane from the fields to the mill.

1. Interpretative Bulletin No. 14 clearly rules that hauling of the mill operator's own cane to his mill constitutes "agriculture" (Quoted in Appellant's Br. p. 47). Appellees argue (Br. p. 21) that this is contrary to the decision of the Court of Appeals for the First Circuit in *Vives* v.

Serralles, 145 F. (2d) 552. But in discussing the *Vives* case, appellees (Br. p. 28) state categorically that the court held that the "workers on the farm on which the mill was operated engaged in hauling the cane direct to the mill, were exempt . . . under Section 13(a)(6)." This inconsistency is nowhere explained. Since by the appellees' own admission, the *Vives* case did hold that transportation of the mill operator's own cane to his mill constitutes "agriculture", such decision fully supports the Administrator's statement in Interpretative Bulletin No. 14 and shows that the cane transportation operations in the case at bar likewise fall within the definition of "agriculture".

2. Appellees' discussion of the *Vives* case is replete with misstatements and untenable inferences. Appellees state (Br. p. 28) that in the *Vives* case the cane on outlying farms was hauled "by the harvesters thereof" to the "concentration points." If by the term "harvesters" the appellees mean the employees who sever the cane from the ground, a reading of the decision will show that such employees were not the employees who hauled the cane. The court listed the activities of the plaintiffs as follows:

> ". . . they were engaged in the following types of work: laying portable tracks and moving them from one field to another; loading steel cars, portable track cars, or ox-carts in the field; picking up cane dumped by ox-carts and loading railroad cars at the sidings; handling winches, derricks or cranes at the loading points; and tractor operators, portable track car drivers, and ox-cart drivers."

It then held that the can transportation operations of the plaintiffs were part of "harvesting" as that term is used in the statutory definition of "agriculture." Obviously then the plaintiffs were "harvesters" only in the sense that they transported cane from the fields to the mill.

Appellees assert (Br. p. 31) that since the instant case does not present the precise "concentration point" system which prevailed in the *Vives* case, then "transportation" (as distinguished from "harvesting") begins in this case at the time the cane is placed in the railroad cars in the fields. This is a *non sequitur.* The absence of concentra-

tion points makes the case here similar to that of the employees in the *Vives* case who hauled cane directly to the mill, and such employees were held by the court to be engaged in a "harvesting" operation.

In a vain attempt to distinguish the *Vives* case, appellees assert (Br. p. 32):

> "Nor can we lose sight of the further distinguishing features heretofore discussed, such as appellant's *sugar refining activities*" [Emphasis supplied].

Such statement disregards the stipulated fact that the appellant "does not engage in any sugar refining operation" (R. 132).

II. The appellant's office and maintenance workers are exempt entirely under Section 13(a)(6) or partly under Section 13(a)(6) and partly under Section 7(c). In either event they are exempt from the overtime provisions of the Act.

Appellees (Br. pp. 22-23) dispute that the office and maintenance workers in the case at bar are exempt under the "agriculture" exemption, because much of the time and effort of such workers is related to activities having nothing to do with sugar cane production. To this we make two replies. First, in our main brief (pp. 22 *et seq.*) we have shown that all of the activities of appellant are exempt under the "agriculture" exemption. Hence whether the work of the maintenance and office employees relates solely to cane production or partly to some other aspect of the appellant's total plantation operations, such employees are exempt. Second, if some of appellant's activities are not exempt under Section 13(a)(6), they are exempt under Section 7(c) (Appellant's Br. p. 51 *et seq.*). Consequently the office and maintenance employees, at worst, are partly engaged in work related to cane production and partly in work related to cane processing. The former work is exempt under Section 13(a)(6); the latter under Section 7(c). As the court below held, an employee engaging in activities, some of which are exempt under Section 13(a)(6) and the remainder of which are exempt under Section 7(c), is exempt (R. 433, 445). Neither party has appealed from such holding and it is obviously correct.

II.

EMPLOYEE APPELLEES, WHO ARE ENGAGED IN THE HAULING OF SUGAR CANE FROM THE FIELDS TO THE MILL, THE PROCESSING OF SUGAR CANE INTO RAW SUGAR, AND THEIR INCIDENTAL AND FUNCTIONALLY NECESSARY AND INDISPENSABLE OPERATIONS, ARE ALSO EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT BY VIRTUE OF SECTION 7(c).

A. The exemption applies during the off-season.

1. Appellees (Br. pp. 35-36) have misconceived our argument. We contend that in order for the Section 7(c) exemption to apply two facts must be shown: (i) The employee must be employed in an activity which is directly and intimately connected with sugar cane processing; and (ii) The employee must work in the "place of employment" where the sugar cane processing activity takes place. We have shown that the off-season work is necessary repair and reconditioning work on the processing machinery and equipment required to permit the mill to continue operating (Appellant's Br. pp. 65-66), and that it occurs in the "place of employment" where the employer is engaged in processing sugar cane. *Id.*, pp. 54, 66. Accordingly, the processing exemption applies to the "off-season" work. Unlike shoe manufacturing in the hypothetical example offered by appellees, the repair work here involved is directly connected with and an integral part of sugar cane processing.

2. It is irrelevant to the issue here that pursuant to a collective bargaining agreement (Appellees' Br. p. 36), appellant is paying overtime compensation to its employees for work in excess of 40 hours per week during the off-season. It should first be stated that the only employees of appellant (other than a few who are on a 40 hour week throughout the year) who receive such overtime compensation during the off-season are employees in the mill and allied service shops (R. 137). Moreover, what appellant may agree to in collective bargaining has no relation to the requirements of the Fair Labor Standards Act as found

by this Court. *Bay Ridge Operating Co.* v. *Aaron,* 334 U. S. 447, 463. It is common knowledge that an employer, for purposes of effecting a collective bargaining agreement with his employees, will agree to higher wage and hour standards than are required by law.

Nor is the question moot with respect to those employees to whom appellant voluntarily makes payment of such overtime compensation during the off-season. It is specifically stipulated (R. 137) that appellant contends, contrary to the contention of the appellees, that the provisions of the Fair Labor Standards Act do not require it to pay any of its employees overtime compensation. A declaratory judgment suit will lie to resolve this controversy. *Sunshine Mining Co.* v. *Carver,* 34 F. Supp. 274 (D. Idaho 1940).

B. The exemption applies to the activity of hauling sugar cane from the fields to the mill.

1. Appellees argue (Br. pp. 37-38) that in *Calaf* v. *Gonzales,* 127 F. (2d) 934 (C. C. A. 1), the lower court held that neither the "processing" nor the "agriculture" exemptions applied to the transportation employees; and that the correctness of the District Court's decision that these employees were not subject to the "processing" exemption was not attacked on the appeal nor even discussed by the Circuit Court.

The assertion that the District Court passed upon the "processing" exemption is unwarranted. The District Court wrote no opinion in the *Calaf* case but on August 23, 1941, entered Findings of Fact and Conclusions of Law together with a Judgment. We have examined all the papers in this case in the files of the U. S. Department of Labor. There is not a word in the Findings and Conclusions about the Section 7(c) processing exemption. Nor is there anything in the pleadings or in the briefs of the parties to indicate that that exemption was in issue in the case. In fact, all indications are that the parties and the court assumed that the Sec. 7(c) exemption did apply, for the employees worked over 40 hours during a week, did not receive any overtime compensation, and neither sought nor were

allowed any overtime recovery. And in the Circuit Court the transportation of sugar cane in the circumstances of the case was held to be "incident to milling", thus indicating that such transportation is part of processing and therefore entitled to the same exemption as any other part of the processing operation (Appellant's Br., pp. 46 (footnote 32), 57.)

2. Appellees assert (Br. p. 38) that the Administrator's interpretations foreclose any exemption under Sec. 7(c) unless the worker is employed in the structure where the processing operation is carried on. The Administrator's interpretations show the contrary (Appellant's Br. pp. 60-63, 90-92.) Such interpretations show that the Administrator regards the Section 7(c) exemption as applicable to employees transporting raw materials to the processing establishment and finished products away from it. In fact, he regards the exemption as applicable to work in a warehouse located in an adjoining county.

C. If a plant engages exclusively in an operation described in Sec. 7(c), such as the processing of sugar cane, the exemption applies to all employees of that plant including those engaged in activities that are functionally necessary and indispensable to the described operation.

1. Appellees (Br. pp. 39, 44) cite authorities[5] to the effect that Section 7(c) does not exempt industries from the overtime provisions of the Act but only the specific processes therein mentioned.

But these holdings were made with respect to plants that were engaged both in operations which the exemption language of Section 7(c) describes and in other operations which such exemption language does not describe. In the *Swift* case, the employer not only was handling, slaughtering and dressing livestock—the only operations on livestock exempted by Section 7(c)—but also was performing other operations that Section 7(c) does not exempt. And in the *Bridgeman-Russell* case, the employer was not only

[5] *Fleming* v. *Swift*, 41 F. Supp. 825, 831 (N. D. Ill. 1941) and *Walling* v. *Bridgeman-Russell Co.*, (D. Minn. 1942) 6 Labor Cases ¶ 61,422.

engaged in the first processing of milk, whey, skimmed milk and cream into dairy products, but was also performing other operations that Section 7(c) does not exempt. Here, however, aside from the growing of cane, the appellant is engaged exclusively in an operation which Section 7(c) exempts, to wit the processing of sugar cane into raw sugar and molasses. As shown by the cases discussed in our main brief (pp. 57-59 and footnote 41 on p. 59), where the courts have had before them a plant engaged exclusively in an operation which Section 7(c) exempts, they have uniformly held exempt all activities which are functionally necessary and indispensable to such exempt operation. The Administrator is likewise of this view. *Id.*, pp. 89, 90.

2. Appellees (Br. pp. 45-46) question appellant's reliance upon *Abram* v. *San Joaquin Cotton Oil Co.*, 49 F. Supp. 393 (S. D. Calif. 1943). They assert that the *Abram* case is distinguishable because there the employer's sole operation was processing cotton seed, while here the appellant, besides processing sugar cane, produces the raw material, transports it to the mill, ships raw sugar, participates in the refining operation and maintains in Hawaii a "company town" where the workers and their families reside. But all of these other activities in which appellant engages are either (i) component parts of its activity of growing sugar cane and therefore exempt under Section 13(a)(6), or (ii) necessary and indispensable elements of its processing operation and therefore exempt under Section 7(c), or (iii) with respect to the dwelling house maintenance work, not covered by the Act at all because not constituting an engagement in commerce or in the production of goods for commerce. Appellees do not show to the contrary.

3. In setting forth the Administrator's interpretations of Section 7(c) on pages 42-43 of their brief, appellees fail to make any reference to (a) paragraph 22 of Interpretative Bulletin No. 14, set forth in relevant part in the appellant's brief, p. 89, or (b) the Administrator's press release of January, 1943, discussed at length on pages 61 and 90-91 of appellant's brief. These interpretations show that the Administrator regards the Section 7(c) exemption as applicable to employees transporting raw materials to the

processing plant and finished products away from it, and also to all other employees engaged in activities functionally necessary and indispensable to the processing operation. In accord is the opinion of the Administrator's attorneys that employees of a sugar mill engaged in transporting raw sugar from the mill to the employer's warehouse located 7 miles away are within the Section 7(c) exemption. *1944-45 WHMan.* p. 609. See also the Administrator's interpretation *id.*, pp. 603-604.[6]

D. Any employee appellee, who in a workweek performs some work which is exempt under Section 13(a)(6), other work exempt under Section 7(c), and other work which is not within the coverage of the Act at all, is exempt during such workweek from the overtime provisions of the Act.

Appellees (Br. pp. 40-41) list a number of activities and assert that appellant contends the Section 7(c) exemption is applicable to workers engaged in such activities. They assert that this contention is unsound because such activities do not relate exclusively to the processing of sugar cane. *Id.* p. 45. Again, appellees contend that the Section 7(c) exemption does not apply to employees such as machinists, welders, etc., because their work is not confined exclusively to the cane processing facilities but is also performed in connection with transportation, housing, irrigation, cultivating, harvesting and other non-processing facilities. *Id.*, pp. 41, 42, 46.

Appellees have misstated appellant's contention and have ignored the following two principles of law:

(a) Any employee engaged during any workweek in activities, some of which are exempt under Section 13(a)(6) and the remainder of which are exempt under Section 7(c), is exempt from overtime requirements for that workweek.

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[6] Appellees (Br. pp. 43, 45) also rely upon paragraph 18 of the Administrator's Interpretative Bulletin No. 14 which provides that removing bagasse from the mill and baling and compressing same are not exempt operations under Section 7(c). But these are extraneous facts, since bagasse is not removed from the appellant's mill nor is it baled and compressed (Appellant's Br. p. 63).

(b) Any employee, who in any workweek performs some work that does not constitute commerce or the production of goods for commerce and other work which is exempt under either Section 13(a)(6) or Section 7(c), is exempt from overtime requirements for that workweek.

These propositions are patently sound because certainly in order to fix an obligation upon an employer to pay overtime under the Act, it must be shown that at least some of an employee's work (i) constitutes commerce or the production of goods for commerce, *and* (ii) does not come within any exemption from the overtime provisions of the Act. This is the view taken by the court below, by other courts and by the Administrator (Appellant's Br. pp. 79-80).

The activities listed by the appellees in part relate to sugar cane growing, in part to sugar cane processing and in part to housing maintenance. We submit: First, all of these activities are within the agricultural exemption. Second, if all these activities are not within the agricultural exemption, then to the extent to which they are connected with sugar cane growing, they are exempt under the agricultural exemption; to the extent to which they are connected with sugar cane processing, they are exempt from overtime requirements under Section 7(c); and to the extent to which they relate to dwelling house maintenance they are not covered by the Act at all. Thus even if an employee devotes part of his time in any workweek to work that is not on the cane processing facilities, he is nontheless exempt from the overtime provisions of the Act for that workweek because his other work is exempt under Section 13(a)(6) or is not covered by the Act at all.

III.

THE EMPLOYEE APPELLEES, WHEN REPAIRING AND MAINTAINING APPELLANT'S HOUSES AND RELATED DOMESTIC FACILITIES, ARE NOT "ENGAGED IN [INTERSTATE] COMMERCE OR IN THE PRODUCTION OF GOODS FOR [INTERSTATE] COMMERCE"; BUT EVEN IF THEY ARE SO ENGAGED, THEY ARE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT BY VIRTUE OF SECTION 13(a)(6) AND SECTION 7(c).

A. The village maintenance employees are not "engaged in [interstate] commerce or in the production of goods for [interstate] commerce."

Appellees (Br. p. 52), arguing that the housing maintenance employees are subject to the coverage provisions of the Act, rely upon *Borden* v. *Borella,* 325 U. S. 680. In that case the Act was held to apply to maintenance workers in the office building of a manufacturing corporation from which a nationwide "industrial empire" was supervised, managed and controlled. Such management and control of the physical production process, plus accompanying clerical and accounting activities, were so immediately part of the production process that the maintenance services in that building were held necessary thereto. In the case at bar, however, the maintenance services are rendered on homes provided on a voluntary basis merely to satisfy the personal needs of employees completely apart from their production activities; and said services are performed in locations physically removed from the situs of the plantation's production activities, including the management, administration, control, accounting and clerical aspects of such activities; and the dwelling houses on which said services are performed are not used in, devoted to, or necessary to, the production process or its administration or management aspects. The *Borden* case is thus distinguishable from the case before the court.

The main cases relied upon by appellees (Br. pp. 53-54), *Basik* v. *General Motors Corp.,* 311 Mich. 705, 19 N. W. (2d) 142, *Ferguson* v. *Prophet Co.,* (S. D. Ind. 1946) 11 Labor

Cases, par. 63,297, and *McComb* v. *Factory Stores Co.*, (N. D. Ohio 1948) 15 Labor Cases par. 64,760, merely hold that employees working in a cafeteria or canteen located in a plant producing goods for commerce are themselves within the coverage of the Act. Holding to the contrary under these circumstances is *Kuhn* v. *Canteen Food Service, Inc.*, (N. D. Ill. 1944) 9 Labor Cases par. 62,517, appeal dismissed 150 F. (2d) 55 (C. C. A. 7).

Aside from the fact that the cafeteria cases are in conflict with each other, they are readily distinguishable on their facts from the case here. In those cases, as the courts found, the production efficiency of the employees was increased and a higher production level was maintained through the operation of the cafeterias and canteens. *Basik* v. *General Motors Corp.*, 311 Mich. 705 at 708. In the case at bar, however, there is nothing in the record from which it may be inferred that the appellant's plantation operations are any more efficient because the employees live on the plantation, and as a matter of fact they are not more efficient because of that factor.

Furthermore, in the cafeteria cases practically all the patrons of the cafeteria were the employees of the producer for commerce while in the case at bar many of the dwelling houses are occupied by persons not employed by the appellant (R. 222). Also in the *Factory Stores* case the employees were not permitted to leave the plant premises during their shift even for the purpose of eating lunch. The production employees in those cases were for all practical purposes required to eat at the plant cafeteria. In the instant case, however, the record shows that occupancy of the dwelling houses on the plantation is optional with the employees (R. 221). They can live anywhere they choose, whether on or off the plantation and in fact some of them do live off the plantation (R. 222). Unlike the situation in the cafeteria cases, the housing maintenance employees in the case at bar "serve the needs" of the employees only when the latter are completely separated in space and function from the production of goods for commerce. In the cafeteria cases the cafeteria employees work right in the plant where goods are produced for commerce. Here, the maintenance employees work at the homes of the employees

who *elsewhere* produce goods for commerce and who occupy these homes when they are *not* engaged in production.

Assuming that the cafeteria employees may be engaged in work which is part of an integrated effort for the production of goods for commerce, the housing maintenance employees here do not bear a sufficiently immediate and direct relation to production for commerce to be deemed part of such integrated effort. See cases discussed in appellant's brief pp. 73-75. Such maintenance work is indistinguishable in principle from the essentially local repair activity of plumbers, housepainters and others in local trade in innumerable villages, towns and cities in the United States. Congress never intended to sweep all such local service activities into the coverage of the Act (Appellant's Br. p. 76).

B. If the village maintenance employees are "engaged in [interstate] commerce or in the production of goods for [interstate] commerce," they are exempt from the overtime provisions of the Act by virtue of Section 13(a)(6) or of Section 7(c).

We have shown that if, contrary to the foregoing, the housing maintenance employees are held "necessary to the production of goods" for commerce, then by the same token they are exempt from the overtime provisions of the Act by virtue of Section 13(a)(6) or of Section 7(c) (Appellant's Br. pp. 77-79). In all the cases cited by appellees, the maintenance work was held to be necessary to production covered by the Act; e.g., manufacturing of steel, motors and automobiles. In the case at bar, however, production of sugar cane is wholly exempt under Section 13(a)(6), and production of raw sugar is exempt from overtime under Section 7(c). In no circumstances, therefore, can the overtime requirements of the Act extend to the housing maintenance employees herein.

Appellees contend that housing maintenance employees will frequently be engaged part of the week in the maintenance of houses and part of the week in the maintenance and repair of processing and field equipment (Br. p. 54). When engaged in the latter activities, the appellees go on to say, the employees are engaged in the production of

goods for commerce and therefore they are entitled to the Act's benefits for the entire workweek. We concede that the employees are engaged in the production of goods for commerce while performing such maintenance and repair work. We contend, however, that such employees are not entitled to the Act's benefits because they come under either the Section 13(a)(6) or Section 7(c) exemptions with respect to such production. Appellant's Br. pp. 79-80.

Respectfully submitted,

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